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# Supreme Court of the United States

OCTOBER TERM, 1942.

No. 503

RAU CONSTRUCTION COMPANY, A CORPORATION, PETITIONER,

VS.

PHILLIPS PETROLEUM COMPANY, A CORPORATION, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF FOR RESPONDENT IN OPPOSITION.

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*Counsel for Respondent.*

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### OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 130 F. 2d 499.

## STATEMENT OF THE CASE.

It is respectfully submitted that the petition should be denied:

(1) Because no question of general importance is involved;

(2) Because the decision of the Circuit Court of Appeals is in accord with settled law and is not in conflict with the decision of any other Circuit Court of Appeals; and

(3) Because Petitioner has failed to comply with Rule 38, paragraph 2, of this court.

Petitioner's assertion of a question of "special importance in the permanent public interests," and the contravention of "good morals, public policy and engineering ethics," that the "errors gravely affect the construction industry and the engineering profession," that "the construction industry is endangered by the approval of fraud," and other similar vague assertions (Petition p. 18), are wholly without support in the record.

The case involves contractual rights between two corporations; nothing more.

Succinctly stated, the District Court held that Petitioner was permitted to contract to do specified work at specified prices, perform the work and receive pay in accordance with the contract at periodic settlements, and, when the work was completed and the last check tendered, then for the first time assert that there was no contract and that payment for all of the work should be upon *quantum meruit*. The Circuit Court of Appeals held the contrary, and further, that there was a valid and binding contract.

It is apparent that the decision involves no question of public importance.

That the decision is in accord with settled law, including the law of Missouri, is abundantly shown by the opinion itself and the authorities cited in support of each point decided.

Counsel for Respondent believe that they can best aid the Court by supplying what Petitioner has omitted, namely, a concise statement of the case.

The essential facts in chronological order are as follows: Respondent, Phillips Company, has two plants near Borger, Texas, located about one mile apart. One is the Borger Refinery where crude oil is refined. The other plant is the Central Treater, which by chemical treatment produces natural gasoline of various grades, liquefied gases and pure hydrocarbons. In the spring of 1939, Phillips Company planned an extension of the Borger Refinery and a program of development at the Central Treater of a chemical process (polymerization) used in the manufacture of 100 octane gasoline for use in aviation.

One Gus Rau of Kansas City, Missouri, individually, was engaged in business as a building contractor, operating under the name of Rau *Contracting* Company (R. 215). Gus Rau was also vice president and treasurer of Petitioner corporation Rau *Construction* Company; but his individual operation as Rau Contracting Company was entirely independent of and had no connection with petitioner, Rau Construction Company (R. 215, 1284, 1323-4, 1924, 1925).

On March 21, 1939, Gus Rau notified Phillips Company that he would like to submit a bid on the concrete construction embraced in Phillips Company's projected building program above mentioned, and Phillips Company accordingly sent to him a set of instructions to bidders and a set of the specifications applicable to concrete work (R. 118-119, 1798).

The instructions to bidders gave notice that bids would be received not later than April 7, 1939, "for concrete work at our Borger Refinery and Central Treater

near Borger, Texas"; that "the concrete will be tank bases, engine blocks, cooling towers, building piers and floors, pipe trenches, pipe supports, etc.," and would amount to approximately 6,000 cubic yards at the Refinery and the same quantity at the Central Treater (R. 46). The instructions said (R. 46-47):

> "As the drawings for the individual structures are incomplete at this date, we desire that bidders submit quotations on the individual items as listed on the attached proposal sheet. * * *
>
> "Bidders shall examine carefully all documents, shall visit the site of the work, and acquaint themselves with all conditions pertaining to the work. A specimen contract form, of the type to be executed by the parties to this agreement, is attached. Bids shall be made on the attached proposal sheet and must be itemized as set out thereon."

The specifications described in detail the required quality and the method of mixing, placing, finishing and curing the concrete, and the required methods to be followed in the excavation, form work and other work incidental to concrete construction (R. 47-57).

On April 5, 1939, Gus Rau visited the site of the proposed construction at Borger, Texas, in order to acquaint himself with the conditions (R. 216, 1479-80). He there inspected the two existing plants of Phillips Company (R. 217-221, 222-4, 1480-4), where he could see, in existing structures, substantially all of the various types of concrete construction to be errected in the proposed new work (R. 114-117).

**Gus Rau's Conversations with Phillips Company's Employees Prior to Written Contract.**

While at Borger on April 5th, Gus Rau talked with two or three of Phillips Company's employees and acquired information from them regarding concrete structures in the existing plants (R. 218, 220, 1480-4).

On April 8, 1939, Gus Rau called at Phillips Company's office at Bartlesville, Oklahoma, where he met a Phillips Company engineer named Charles W. Hubbell (R. 225). Gus Rau testifies that he asked Hubbell for a "cross section" of the work to be done, which Gus Rau defined as follows (R. 225):

> "A cross section is the sizes, the types of the different items, concrete items, making up a portion or the whole of the amount of concrete that is to be poured on any particular job."

He says that Hubbell read from some document a number of different concrete items, with the amount of yardage in each; and after reading off enough items to total about 2,500 yards of concrete, Hubbell stopped reading and said that Gus Rau "could consider the rest of the concrete to be the same" (R. 226). One Calloway, who accompanied Gus Rau, substantially corroborated Gus Rau's version of the conversation (R. 1497-1506). A memorandum of the items read off by Hubbell was made at the time by Calloway, which, according to Gus Rau, expresses "the results of the conversation with Mr. Hubbell." A facsimile reproduction of this memorandum is in the record (R. 227).*

Hubbell testifies that in the conversation aforesaid Gus Rau did not ask for any "cross section"; that he (Hubbell) had prepared no "cross section"; and that if he had undertaken to do so, it would not have been in the form of the above memorandum (R. 1746). Other witnesses testified that this memorandum was not a "cross section" of anything (R. 1771-2, 1928).

Hubbell testifies in substance that his conversation with Gus Rau was as follows (R. 1743-4): Gus Rau said he wanted to know the size of the concrete items to be erected,

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*All testimony offered by petitioner Rau Company, as to oral conversations between Gus Rau and Phillips Company's representatives, prior to the making of the written contract, was received by the District Court over Phillips Company's objections (R. 217-18, 219-20, 226, 233, 234, 1550, 1870, 1897).

and asked to see the plans therefor; and Hubbell said there were none.* Hubbell said to Gus Rau that he had on his desk a cost estimate which contained in some detail the concrete items to be built; and he offered to and did read off a list of items therefrom. As he read off each item, he would give a general description of it by name, and would state the cubic yards of concrete which it was estimated that the item would contain. After reading off 30 or 40 items Hubbell suggested that the items he had read should be sufficient to show the range and size of items to be built. Hubbell told Gus Rau that the cost estimate from which he was reading was simply the best estimate that could be made at the beginning of a job as to the over-all cost, but it was subject to variations as the job progressed. Hubbell called attention specifically to the fact that in reading from the cost estimate he had not read off any small items of construction; and he explained that it was Phillips Company's practice not to incorporate in a cost estimate small items, involving only a few dollars, but rather to lump them in without itemizing them. Hubbell told Gus Rau that there would be a great many small items to be built. Hubbell also told Gus Rau that definite information as to quantities of material to be used were not available; and that it was for that reason that Phillips Company was taking bids on the work in the form of unit prices rather than in a lump sum for a complete job (R. 1746). Hubbell's testimony was corroborated by that of another witness who was present at the conversation (R. 1647-8, 1666-7).

**The Contract.**

On April 8, 1939, Gus Rau submitted to Phillips Company his bid in writing, wherein he said (R. 70-1):

> "Having carefully examined the instructions to bidders, the contract, and the specifications, the un-

*It was true, as stated in the "instructions to bidders" (R. 46), that no plans had then been prepared by Phillips Company (R. 120, 1742, 1845).

dersigned proposes to furnish excavation, back fill and disposal of excess excavated material, form construction and removal, reinforcing steel, wire mesh, and anchor bolts, furnishing and placing of concrete, and all incidentals for concrete structures at the Borger Refinery and Central Treater near Borger, Texas, in accordance with the said documents, for the following sums, quantities measured in place:" (Here follow his proposed unit prices.)

"If this bid is accepted, I, or we, agree to enter immediately into a written contract covering this work, and to furnish surety bond within the specified time."

In a letter accompanying the bid Gus Rau supplemented his proposal by further conditions and covenants as follows (R. 71-2):

"1. Water and electricty are to be furnished by the Phillips Petroleum Company without charge to us.

2. No rock excavation is figured in our bid.

3. Expansion joints will be installed at actual cost of material and no charge made for labor.

4. Anchor bolts, nuts and sleeves, you to furnish same, also location of same. We will install bolts at unit price of $.24 per bolt.

5. We will install concrete plant with a capacity of 1,000 yards every 24 hours. We will have necessary equipment such as steam shovels, tractors, trucks, hoists, towing and small tools to take care of job. We will have concrete plant in operation in two weeks.

6. We will furnish bond in the amount you desire. You are to pay for premium of same."

There were five other bidders on the concrete work (R. 108-9). The bid of Gus Rau was accepted and he was accordingly notified (R. 125, 365, 1800). Thereafter a written contract was entered into between Gus Rau and Phillips Company, dated April 10, 1939 (R. 126, 366, 1802-3). The contract is numbered "P. P.-1617" (R. 5).

The contract provided that Gus Rau agreed to perform the "concrete work for Borger Refinery and Central Treater in connection with polymerization program and refinery extension as provided for herein, and in accordance with the plans and specifications"; that he would "begin said work within two weeks and proceed diligently with said work to completion; and to complete same as quickly as drawings are completed"; that he would "perform the work to the entire satisfaction of the Engineer" (Phillips Company's Chief Engineer), and in accordance with the attached specifications, and with plans "to be furnished later" (R. 5). The contract gave Phillips Company the right "to make such changes in the plans and specifications as may from time to time appear necessary or desirable, or as may be recommended by the Engineer, and such changes shall in no way invalidate this agreement" (R. 6). In regard to extra work the contract provided as follows (R. 6):

> "Contractor shall not be entitled to any payment for extra work performed, unless such work shall have been specifically authorized in writing by the Engineer. The amount and method of payment for any such extra work shall be approved by both Contractor and Engineer before such work is commenced. The Contractor shall submit to the Company on the first and fifteenth of each month, a detailed statement of the amounts due for extra work."

The contract provided further (R. 7-8):

> "Contractor shall obtain data on quantities necessary for the proper performance of the work from such sources as he sees fit to rely upon. Company will not be held responsible for any quantities expressly stated or implied by any of its representatives, except in so far as the dimensions shown on drawings affect such quantities. Contractor shall assume entire responsibility for examination of the premises and acquaintance with all conditions."

Regarding payment to the Contractor the contract provided (R. 14):

> "As full and complete consideration for the work performed under this contract, the Company shall pay to the Contractor at the times and places, and under the conditions provided herein, the following sums and amounts of money for work done:

| | |
|---|---|
| "1. Excavation, including backfill and disposal of excess material | $ .53 per cu. yd. |
| 2. Forms and form removal | .154 per sq. ft. contact area |
| 3. Reinforcing steel | .045 per lb. |
| 4. Wire mesh reinforcing | .0712 per lb. |
| 5. Expansion joints - actual cost of material only | |
| 6. Anchor bolts, nuts, and sleeves | .089 per lb. |
| 7. Class A (1-2-4 concrete) | 9.75 per cu. yd. |
| 8. Class B (1-2 1/2-5 concrete) | 9.05 per cu. yd. |
| 9. Class X (1-2-4 quickset concrete) | 10.50 per cu. yd. |
| 10. Class Z (1-2) grout | 13.92 per cu. yd." |

The contract provided that Phillips Company's Engineer would on the 1st and 15th days of each month submit an estimate of the quantity of work done, and that Phillips Company would pay Gus Rau, approximately ten days after date of estimate, 85 per cent of the quantities estimated to be due him; and that the remainder of the consideration would be paid after final completion of the work (R. 15). The contract provided that it should "inure to and be binding upon the * * * successors * * * of the parties hereto" (R. 15). It further provided that "the general conditions of the contract, the specifications and the drawings, together with this agreement, form the contract and that they are as fully a part of the contract as if hereto attached or herein repeated" (R. 17). The contract was signed by Phillips Company through A. H. Riney (Vice President), and by Gus Rau individually (R. 1182-3).

In lieu of surety bond guaranteeing performance by the Contractor, petitioner, Rau Company in writing assumed or guaranteed "all liabilities contracted by" Gus Rau for the job (R. 72, 136-7, 367, 1800-1, 1802). This

guaranty was signed "Rau Construction Company, by K. E. Rau, President" (R. 72). This was the first time that Rau Company entered the transaction; and at this stage it was merely as guarantor of the liabilities of Gus Rau, the Contractor (R. 1324).

On May 18, 1939, or 38 days after date of contract, upon request of Rau Company and Gus Rau and by consent of Phillips Company, Rau Company succeeded Gus Rau as Contractor under the written contract (R. 74, 126-7, 864, 1093-4, 1837, 1909, 1925).

On June 17, 1939, the written contract of April 10, 1939, was modified by a supplemental agreement in the form of a letter of Phillips Company's Chief Engineer to Rau Company, agreed to in writing by Rau Company, which provided for certain additional unit prices (R. 18-19, 1183):

**Performance by Gus Rau and by Rau Company under Contract, and Payments by Phillips Company Thereunder.**

Gus Rau moved his equipment to Borger about April 20, 1939, entered upon the performance of the contract about April 27, 1939 (R. 367-8, 820), and continued until he was succeeded by Rau Company on May 18, 1939, as above stated. Rau Company continued performance under the contract, as successor of Gus Rau, until November 14, 1939 (R. 883). Thus the total period of performance under the contract by Gus Rau and by Rau Company was about seven months.

The procedure during this interval was as follows (and the District Court so found—R. 1926): Phillips Company from time to time would supply the Contractor plans of structures to be erected (R. 371, 436-654). Phillips Company would stake out the locations and would give notice in writing of items ready for construction (R. 371, 411-436). After the Contractor had completed a given item, Phillips Company would calculate the quantities of material used therein and the amount due therefor at the

contract price; and would write this information upon a printed form known as an "extra work order," which would then be submitted to the Contractor for checking and acceptance. The Contractor would check its accuracy and, if it was found correct, would indicate approval by signing it as follows: "Accepted by Rau Construction Company, Contractor" (R. 965, 947, 973, 1862).

The form of "extra work order," as its name implies, was originally designed some years ago for use by Phillips Company in directing a Contractor to perform extra work, *i. e.*, work not covered by a contract; but in this case the form was by common consent used as a memorandum to state the agreement by Phillips Company and the Contractor as to quantities involved and amount due Contractor on each item of work and materials furnished (R. 1645, 1660-1, 1844-5, 1862, 964-5, 1305-8). The district court found (R. 1927):

> "Every structure built by Gus Rau and plaintiff was covered by a work order on the form described in Paragraphs 17 and 18 hereof, which purported to cover all of the materials and work furnished by Gus Rau and plaintiff, specified the unit prices therefor, and the total amount of money due therefor. All of said work orders were accepted and signed by Gus Rau and plaintiff, and, except for work orders totalling $982.30, for which plaintiff sues and defendant offers judgment, payment was made to plaintiff by defendant in accordance therewith in the amount of $230,260.04."

The work orders were audited by Phillips Company's home office staff at Bartlesville, and any errors found were corrected (R. 1662, 1696, 1697, 1185, 1307). The amount involved in the corrections was inconsequential. Only 37 work orders of the total of approximately 740 were thus corrected; the corrections in favor of Rau Company totalled $721.79; corrections in favor of Phillips Company totalled $982.56; the balance of corrections was therefore $260.77 (R. 1698). Notice of the corrections was given

to Rau Company, through copies of statements periodically sent to them with checks.

Based on the figures in the work orders, periodical statements (on a printed form called "Contract Estimate") were prepared by Phillips Company as the basis for periodical payments to Rau Company (R. 147, 974, 977-1086, 1327-1349, 1351). Each statement recited that it was made "per contract," being "Contract No. P. P.-1617"; and it named Rau Company as the Contractor. It listed the work orders which it purported to cover, by number, described the work covered thereby, stated the cubic yardage or quantities involved and the amount due therefor in dollars and cents (See facsimile reproductions of these statements at R. 977-1086, 1327-1349).

Duplicates of these statements, together with drafts in payment of amounts shown due thereby, were sent to Rau Company periodically by Phillips Company (R. 1352-1367). There were 26 such drafts in all, issued between June 3, 1939, and December 20, 1939 (R. 1089-1090, 1244). Each draft recited on its face: "In full settlement of the within account" (R. 1089). The final draft dated December 20, 1939, for $1,787.51, was returned by Rau Company's counsel, because the letter enclosing it had recited that it was in final payment, and because by that time Rau Company was asserting additional amounts due (R. 1244). All drafts except this last one were endorsed by and paid to Rau Company (R. 1090), totaling $230,261.

**Recognition by Both Parties of the Validity of the Contract.**

Rau Company never denied or questioned the validity of the contract during the whole progress of the work (R. 1787, 1858). The record is replete with documents emanating from Rau Company or signed by its officials and representatives, which referred to and apparently recognized the contract (R. 897-8, 1125, 1126, 1129, 1130, 1141, 1276-7; and see Defendant's Exhibit 16, received in evidence at R. 969, sent to the Circuit Court of Appeals

for inspection, said exhibit embracing the work orders, approximately 740 in number).

The first time that Rau Company inferentially questioned the validity of the contract was on November 24, 1939—7 1/2 months after date of contract (R. 5), and 10 days after it had ceased performance under the contract (R. 883)—when for the first time it advanced the claim that Phillips Company had misrepresented the job to Gus Rau (R. 176, 1156-7, 1820, 1858, 888). The first time Rau Company definitely denied the validity of the contract was on January 2, 1940, when it filed this suit (R. 1, 3).

Phillips Company at all times recognized the contract as in full force and effect, as shown by hundreds of letters (R. 429-30, 435, 437-651, 898-9, 903, 1122-3, 1136, 1140, 1352, 1354-67, 1381), estimates (R. 977-1082, 1327-49), and work orders (R. 75, 969).

**Contentions of the Parties in the Court Below.**

In its complaint, as above stated, Rau Company attacks the validity of the contract of April 10, 1939, on the grounds of fraud (R. 2, 3) and abandonment (R. 3). The complaint does not challenge, but impliedly recognizes, the validity of the supplemental agreement of June 17, 1939 (R. 3, 37). The complaint prays judgment for these amounts (R. 4):

| | |
|---|---|
| For alleged "Additional work required due to changes from cross section," | $88,480.50 |
| For alleged "changes in forms" caused by changes in plans and by delays, | 35,597.16 |
| For alleged "overtime," | 4,392.20 |
| For alleged "balance on E. W. O. account," | 982.30 |
| For alleged "fine grading," | 230.16 |
| For alleged "tooled edging," | 152.98 |
| Amount prayed, after crediting $368.34 overpayment on anchor bolt account, | $129,467.96 |

Phillips Company denies the alleged fraud and abandonment (R. 61, 66-68); asserts the validity of the contract

of April 10, 1939, and of the modification of June 17, 1939; contends that the contract as modified covered the work and materials furnished; contends that the work orders signed by the parties constitute binding agreements as accounts stated; contends that by Rau Company's acceptance of drafts tendered "in full settlement" there has been an accord and satisfaction, and that full payment has been made to Rau Company for all work performed, except the following, which it has offered to pay (R. 66-67, 111):

| | |
|---|---|
| Balance on E. W. O. (extra work order) account | $ 982.30 |
| Overtime for June 16 and 17, 1939 | 230.60 |
| For settlement of form claim (R. 1868), | 1165.67 |
| | $2378.57 |
| Less conceded credit for overpayment on anchor bolt account | 368.34 |
| Balance conceded, | $2010.23 |

**The Decision Below.**

The case was tried without a jury. The District Court held the contract void upon the two alleged grounds of fraud (R. 1906, 1909-10, 1917-19) and abandonment (R. 1921), also upon other grounds not alleged in the complaint (R. 1-4), namely, uncertainty and lack of meeting of the minds as to subject matter (R. 1874, 1875, 1876, 1909) and lack of mutuality (R. 1909).

Thus sweeping aside the written contract between the parties, the District Court gave judgment in favor of Rau Company and against Phillips Company in the full amount sued for, $129,467.96 with interest aggregating $140,582.53 (R. 79, 1932).

The opinion of the Circuit Court of Appeals reversing the trial court is abundantly fortified by the authorities cited in support of each point decided and requires no argument to sustain it.

Other points were urged upon the Circuit Court of Appeals by Respondent which that court found unnecessary to decide, but which, except for abundant other grounds for reversal, would have required a reversal. These grounds were:

1. Statements made to *Gus Rau* while he was acting upon his *individual* business, as here, were not statements to *Rau Company,* even though Gus Rau happened to be an officer of that company (*Merchants National Bank* v. *Lovitt,* 114 Mo. 519, 525, 21 S. W. 825, 826; *Johnston* v. *Shortridge,* 93 Mo. 227, 231-2, 6 S. W. 64; *Gregmoore Orchard Co.* v. *Gilmour,* 159 Mo. App. 204, 213-14, 140 S. W. 763, 765; *Benton* v. *German-American National Bank,* 122 Mo. 332, 339, 26 S. W. 975; *Kearney Bank* v. *Froman,* 129 Mo. 427, 430, 31 S. W. 769).

2. Statements made to Gus Rau could not be made the basis of a cause of action by Rau Company, to which company the statements were not made and for which company they were not intended (*Western Union Teleg. Co.* v. *Schriver,* (8 C. C. A.) 141 Fed. 538, 542; *New York Title & Mortgage Co.* v. *Hutton,* (Ct. Apps. D. C.) 71 F. 2d 989, 991-2; *Webb* v. *Rockefeller,* 195 Mo. 57, 74, 93 S. W. 772; *Rawlings* v. *Bean,* 80 Mo. 614, 619-20). This point was specifically presented by Phillips Company's requested Conclusion of Law No. V, which was erroneously refused by the District Court (R. 1932).

The Circuit Court of Appeals held that the statements attributed to Respondent did not amount to fraud, so found it unnecessary to pass upon the above points.

*The Petition should be denied.*

Respectfully submitted,

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